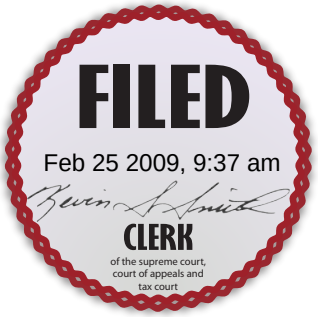

ATTORNEY FOR APPELLANTS:

JOHN A. KRAFT
Young, Lind, Endres & Kraft
New Albany, Indiana

ATTORNEY FOR APPELLEES:

NICHOLAS W. HAVERSTOCK
Burgher & Burgher
Corydon, Indiana

IN THE
COURT OF APPEALS OF INDIANA

BRIAN MAGILL and MAGILL BUILDERS, LLC,	)	
Appellants,	)	
vs.	)	No. 13A01-0803-CV-137
JUSTIN LUTZ and AMANDA LUTZ,	)	
Appellees.	)	

APPEAL FROM THE CRAWFORD CIRCUIT COURT
The Honorable Roger Davis, Special Judge
Cause No. 13C01-0604-CC-44

February 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellants-Plaintiffs/Counterclaim Defendants Brian Magill ("Brian") and Magill Builders, LLC ("LLC") (collectively, "Magill") appeal the judgment in favor of Appellees-Defendants/Counterclaim Plaintiffs Justin and Amanda Lutz based on the breach of a contract for the construction of a new home and fraud. We affirm in part, reverse in part and remand.

Issues

Magill raises several issues that we condense and restate as:

I. Whether the trial court erred in its conclusion that Magill breached the construction contract;

II. Whether the trial court erred in failing to award damages to Magill; and

III. Whether the trial court erred in concluding that Brian and the LLC committed fraud.

Facts and Procedural History

The facts most favorable to the judgment are as follows. On January 20, 2006, the Lutzes and Magill entered into a contract for the construction of a new home. The parties orally agreed that the Lutzes would pay $98,000 for the house, and Magill would complete the construction by May 3, 2006. Magill began construction of the home and hired subcontractors and suppliers, including Stock Building Supply, Inc.

To finance the house, the Lutzes obtained a home construction loan from First Harrison Bank ("FHB"). The terms of the loan prohibited the Lutzes from permitting a lien to be placed on the property. When Magill needed money for portions of the construction, it

would request an amount from the Lutzes, who would in turn request a draw from FHB. The first two draws were allegedly to pay for the lumber and windows. When Magill asked for a third draw, it said that it was also for lumber. Upon inquiring with FHB, the Lutzes were informed that Magill told FHB that the draw was for something other than lumber. By that time, Magill had informed the Lutzes that the price of the home had increased by approximately $9,000. Magill was constantly asking the Lutzes for more money, even to the point of showing up unannounced at Amanda's workplace to request more money.

At this point, the Lutzes contacted their attorney due to their concerns about the increased price of the construction and poor workmanship. On March 1, 2006, Magill met with Nick Haverstock, the Lutzes's attorney, to discuss the Lutzes's concerns. Haverstock reduced their conversation to a letter that he sent to Magill:

> Dear Mr. Magill:
>
> I appreciate you taking the time yesterday to come in and meet with me. The following is my understanding of our conversation. Please let me know if you find any part to be inaccurate:
>
> - Justin & Amanda's home will be completed in early to mid-May for a cost of $112,607.00, unless unforeseen circumstances arise.
> - This price includes an additional 5x19 laundry room that was not in the original plans.
> - Justin & Amanda are not responsible for your excavator's tow bill caused by your excavator getting hung up on the property.
> - You will re-grade the sides of the driveway after construction of the home is completed.
> - Justin & Amanda will receive a $400.00 credit for the lack of plumbing that was agreed to be installed in their basement.
> - You will try to get your excavator to give Justin & Amanda a $255 credit for some of the low quality rock that was hauled for the driveway.
>
> Additionally I have requested the following items from you:

1. An accounting of the first three draws that total close to $25,000.00.
2. Copies of any bills, work orders, or invoices you have received from the subcontractors.
3. For future draws, a breakdown explaining what the money will be used for.
4. Accountings of where the money actually went after you have allotted it to your various workers, subcontractors, or own company.

Plaintiff's Exhibit 7. Prior to being removed from the worksite, Magill informed Haverstock that he would not provide any of the requested information.

After having additional issues as to which subcontractor would install the heating and cooling system, the Lutzes informed Magill, by way of Haverstock on March 16, 2006, that they no longer wished to continue the contractual relationship and that Magill was not to return to the property. Subsequently, Magill filed a mechanic's lien on the property for $58,153.93. Magill then filed a complaint to foreclose on the mechanic's lien, naming the Lutzes, FHB, and Stock Building Supply, Inc. as defendants. By this time, Stock Building Supply had also filed a mechanic's lien on the property for $14,000 for the lumber that was used in the construction.

The Lutzes filed their answer to the complaint as well as a counterclaim alleging theft, slander of title, fraud, and breach of contract on the part of Magill. After FHB and Stock Building Supply filed their answers, FHB filed for summary judgment. FHB paid Stock Building Supply $14,000 in exchange for the assignment of its lien. Therefore, the outstanding issues from the complaint for summary judgment were the interest in the mortgage held by FHB and Magill's request to foreclose on its mechanic's lien. After reviewing the submissions, the trial court held that because the Stock Building Supply lien

was on the property for so long that the Lutzes defaulted on the FHB mortgage and owed FHB a total of $47,898 as well as attorney's fees. The trial court later issued a decree of foreclosure as to the mortgage and dismissed FHB as a defendant. As to Magill's lien, the trial court held that it was void based on the doctrine of unclean hands. The trial court based this conclusion on Magill's failure to pay its subcontractors as it received payments from the Lutzes and its alteration of one of the its subcontractor's invoices to increase the amount owed.

On May 15, 2007, the Lutzes and Magill, the remaining parties to the litigation, agreed to an entry permitting the respective parties to amend the complaint and counterclaim. The trial court judge also recused due to an inadvertent out-of-court conversation about the case, so the parties selected Judge Roger Davis of the Harrison Superior Court to be appointed as special judge in the case. Magill's amended complaint alleged that, based on its contract with the Lutzes, it had incurred $42,916.57 in bills payable to its subcontractors in the partial construction of the home but had only received payments from the Lutzes totaling $24,900. The Lutzes amended their counterclaim to aver that Brian should be personally liable for their damages on their counterclaims, alleging that Magill Builders, LLC is Brian's alter ego.

After a two-day bench trial, the trial court held that the contract was for a specific price, and per the contract, modifications could only be done by written work order. Because no written work orders were in evidence, there were no modifications. As Magill requested thousands of dollars above the contract price within a short time, performed poor workmanship, and failed to pay subcontractors that resulted in a lien on the property, the trial

court concluded that the LLC breached the contract. As to Indiana Code regarding construction warranties on real property, the Lutzes were not required to comply with this statute as Magill did not provide notice to the Lutzes upon entering into the contract that Magill had the right to cure defects. The trial court awarded damages to the Lutzes of $6159 as to the breach of the contract by Magill.

The trial court also concluded that the LLC was not Brian's alter ego, so Brian was not personally responsible for the breach of the contract damages. However, as to the fraud claim, the trial court found that Brian had committed fraud by altering one of the subcontractor's invoices to increase the amount due by one thousand dollars and by failing to pay its subcontractors from the money paid by the Lutzes. The trial court determined that the damages that resulted from Brian's and LLC's fraudulent acts were the attorney's fees of $10,500 that the Lutzes were required to pay to FHB in the foreclosure action.

This appeal ensued.

Discussion and Decision

Standard of Review

The trial court entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A). Therefore, our standard of review is two-tiered: we first determine whether the evidence supports the trial court's findings, and second, we determine whether the findings support the judgment. Purcell v. Southern Hills Invs., LLC, 847 N.E.2d 991, 996 (Ind. Ct. App. 2006). Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is

clearly erroneous if it is unsupported by the findings and the conclusions that rely upon those findings. Id. In determining whether the findings or the judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom. Id.

In conducting our review, we cannot reweigh the evidence or judge the credibility of any witness, and must affirm the trial court's decision if the record contains any supporting evidence or inferences. Id. However, while we defer substantially to findings of fact, we evaluate questions of law *de novo* and owe no deference to a trial court's determination of such questions. Id.

Magill appeals from a negative judgment on his complaint. "A party who had the burden of proof at trial appeals from a negative judgment and will prevail only if it establishes that the judgment is contrary to law." Troutwine Estates Dev. Co. v. Comsub Design and Eng'g, Inc., 854 N.E.2d 890, 896 (Ind. Ct. App. 2006), reh'g denied, trans. denied. "A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead only to one conclusion, but the trial court reached a different conclusion." Id.

I. Breach of Contract

First, Magill contends that the trial court erred in concluding that the LLC, and not the Lutzes, breached the contract. In challenging this conclusion, Magill also argues the finding that the parties did not modify the terms of the construction contract is not supported by the evidence. We first address the finding regarding the lack of contract modification.

A. Modification

In its order, the trial court noted that the construction contract provided that "[a]ny and all changes done to [sic] contract after signing will be done only by written work order." Appellant's Appendix at 81 (emphasis in original). The trial court found that there were no changes to the contract, including price, because there was no evidence presented that the parties agreed to changes via written work orders. Parties to a contract may mutually modify the contract. Sees v. Bank One, Indiana, N.A., 839 N.E.2d 154, 161 (Ind. 2005). "Even a contract providing that any modification thereof must be in writing, nevertheless may be modified orally." Id. Thus, it is clear that the trial court's statement that written work orders were a prerequisite for a modification of the contract is in error.

The evidence indicates that there was at least one modification of the contract, namely the change in the location and size of the laundry room.[1] Both parties testified that they agreed to put a larger laundry room in the garage for an additional amount. The evidence deduced at trial was that the laundry room changes were going to cost approximately fifteen hundred dollars. We remand to the trial court to include this additional cost in its findings and modify the judgment accordingly.

The parties also hotly contest whether the letter Haverstock sent to Magill after their conversation constituted a modification of the contract. Magill disagrees with the trial court's interpretation that the letter was not a modification of the contract. At best, the letter

[1] The parties also agreed to add plumbing to the basement. However, the plumbing was not installed because, according to Brian, the rock and water table underneath the basement would make it hard to put in a sewer pit. Thus, the end price of the home was not affected.

represents an offer for modification. Modifications, which are also contracts, must have all the elements of a contract: offer, acceptance and consideration. Stelko Elec., Inc. v. Taylor Comty. Schs. Bldg. Corp., 826 N.E.2d 152, 159 (Ind. Ct. App. 2005).

Haverstock and Magill met for the purpose of ironing out concerns raised by the Lutzes regarding the construction of the home. The letter, drafted by Haverstock, reads in part: "The following is my understanding of our conversation. Please let me know if you find any part to be inaccurate." Appendix at 91. Brian testified that after the meeting, Haverstock indicated that he would speak with the Lutzes about their discussion. Also, Brian told Haverstock that he would consult an attorney and later inform Haverstock of his decision on providing an accounting of the expenditures to date. At most, Haverstock's letter summary of the meeting was an offer by his clients to modify the terms of the contract. However, Brian, as representative of the LLC, did not accept this offer because, after consulting with an attorney, he refused to provide any accounting or invoices from suppliers or subcontractors, which were terms of the offer for modification. Therefore, no additional modifications were made beyond that of the expanded laundry room.

B. Breach of Contract

Second, Magill contends that the trial court erred in finding that it breached the contract as opposed to the Lutzes. The elements of a breach of contract action are the existence of a contract, the opposing party's breach thereof, and damages. Fairfield Dev., Inc. v. Georgetown Woods Sr. Apts. Ltd. P'ship, 768 N.E.2d 463, 473 (Ind. Ct. App. 2002), trans. denied. Whether a party has committed a material breach of a contract is a question of

fact. Frazier v. Mellowitz, 804 N.E.2d 796, 802 (Ind. Ct. App. 2004).

The trial court found that Magill breached the contract by the unjustified $14,000 increase in the price of the home and construction defects.[2] Magill contends that the price increase of the home was not a valid basis for the breach of the contract because the Lutzes agreed to the price increase. As discussed above, the only modification made to the contract was the larger laundry room. After Magill rejected the modification offer, which included the substantially increased price of $112,607, by refusing to provide an accounting of the money drawn to that point, the original contract terms, plus the modification for the expanded laundry room, were controlling. Thus, the price of the home was $99,500, as disclosed by the evidence at trial.

As the home was not completed at this time, the Lutzes were not required to tender the entire purchase price. However, contrary to the agreed upon price, Magill was insisting upon a higher price. "The demanding of the other party a performance to which the party has no right under the contract constitutes such an anticipatory breach." Eden United, Inc. v. Short, 573 N.E.2d 920, 929 (Ind. Ct. App. 1991), trans. denied. A demand for an amount above that contract price in the middle of this contract without mutual assent does not amount to a breach but the repudiation of the contract. "Repudiation of a contract must be positive, absolute, and unconditional in order that it may be treated as an anticipatory breach."

[2] Magill also contends that pursuant to Indiana Code Section 32-27-3-2(a) the Lutzes were required to provide written notice of any defect to the construction professional and the opportunity to repair it. However, to trigger this provision, the construction professional must provide the home owner with notice of the right to cure construction defects. Ind. Code § 32-27-3-12. Magill did not provide such notice. Furthermore, the failure of the home owner to provide a notice of defects under section 2 only prohibits the filing of a complaint. Id. Here, Magill filed the mechanic's lien initiating this lawsuit.

Angelone v. Chang, 761 N.E.2d 426, 429 (Ind. Ct. App. 2001). "The repudiating statement must be clear and absolute." Ralph E. Koressel Premier Elec., Inc. v. Forster, 838 N.E.2d 1037, 1045 (Ind. Ct. App. 2005), reh'g denied.

Here, the price demanded by Magill was approximately $13,000 higher than the agreed upon price. Beyond Magill's testimony, which the trial court did not find credible, no evidence was offered justifying the increase within the confines of the contract. The Lutzes offered to modify the contract to increase the price in exchange for Magill accounting for his past and future expenditures for the construction of the home. However, Magill rejected the offer. Thus, the continued demand for the higher price was a demand for a performance to which Magill had no right under the contract. Therefore, Magill's actions constituted an anticipatory breach of the contract.

"When one party repudiates the contract, the injured party has the option of pursuing one of three remedies: 1) he may treat the contract as rescinded and recover upon quantum meruit; 2) he may keep the contract alive for the benefit of both parties, being at all time ready and able to perform, and at the end of the time specified in the contract for performance, sue to recover under the contract; or 3) he may treat the repudiation as putting an end to the contract and sue to recover the damages caused by refusing to carry out the contract." Scott-Reitz Ltd. v. Rein Warsaw Assocs., 658 N.E.2d 98, 103-104 (Ind. Ct. App. 1995). "If the injured party was not at fault at the time of the repudiation and was adhering to [the] contract when repudiated by the other party, it has discharged its obligations." Id. at 104. Here, the Lutzes were not at fault and were adhering to the contract. On the other hand,

Magill had repudiated the contract, so the Lutzes chose to terminate or rescind the contract and offered to pay Magill's expenses. Because Magill's actions were an anticipatory breach of the contract, the Lutzes acted within the available remedies.

II. Damages

Magill also alleges that the trial court erred by failing to award to it amounts expended in labor and materials for its partial performance. Magill contends that, even if this Court finds that the Lutzes did not breach the contract, the Lutzes received the benefit of labor and materials for which they did not pay. Relying on the theory of quantum meruit, Magill contends that the Lutzes were unjustly enriched in the amount of $18,016.57. Because the Lutzes chose to rescind the contract, abrogating it, the terms of the contract no longer apply. In these circumstances, a party can recover the value of services rendered under the theory of quantum meruit. Troutwine Estates, 854 N.E.2d at 897. A party seeking recovery under quantum meruit, here Magill, must demonstrate that a benefit was rendered to the other party at the express or implied request of that party and that allowing the other party to retain the benefit without paying for it would be unjust. Id.

The only evidence Magill presented of the expenditures and labor was a spreadsheet created by Brian that listed the subcontractors, the amounts paid to each, and any outstanding amounts to be paid. Magill failed to bring any of the cancelled checks demonstrating payment made to the listed contractors. As the trial court found "[Brian's] credibility to be severely lacking[,]" it relied on the contract price of the home and the relevant appraisal of the home to determine any damages to either party. Magill's request for this Court to use its

spreadsheet rather than the contract price and appraisal is simply an invitation to reweigh the evidence. We decline that invitation.

III. Fraud

Finally, Magill argues that the trial court erred in finding that the actions on the part of Brian as well as the LLC constituted fraud, causing them[3] to be liable for the attorney's fees the Lutzes paid to their bank in the foreclosure proceedings. The elements of fraud are: (1) a material misrepresentation of past or existing fact(s) by the party to be charged, which; (2) was false; (3) was made with knowledge or in reckless ignorance of the falsity; (4) was relied upon by the complaining party; and (5) proximately caused the complaining party injury. Precision Homes of Indiana, Inc. v. Pickford, 844 N.E.2d 126, 131 (Ind. Ct. App. 2006), trans. denied.

The trial court found that "Magill's scheme was to get more money out of Lutz than he agreed to build the house for." Appendix at 84. As a part of this scheme, the trial court noted that Magill increased the price of the home, altered a subcontractor's invoice to increase the bill by $1000, failed to pay the subcontractors as money was received from the Lutzes, and filed an inflated mechanic's lien. The trial court found that the Lutzes incurred the attorney's fees of their bank in the foreclosure action as a result of Magill's fraudulent actions. Both the LLC and Brian were found jointly and severally liable for these damages as Brian, the sole owner and employee of the LLC, was the individual that altered the invoice

[3] Magill does not specifically challenge the trial court's order in its ruling that the LLC and Brian are jointly and severally liable for the damages resulting from their fraudulent actions. Because this potential issue is not addressed, it is waived. See Ind. Appellate Rule 46(A)(8)(a).

and filed the inflated mechanic's lien.

Specifically, Magill challenges that the increase of price was not fraud separate from the breach of contract and the other actions do not constitute fraud. If a claimant brings a breach of contract and fraud claim, the claimant must prove that (1) the breaching party committed the separate and independent tort of fraud and (2) the fraud resulted in injury distinct from that flowing from the breach of contract. Am.'s Directories, Inc. v. Stellhorn One Hour Photo, Inc., 833 N.E.2d 1059, 1067 (Ind. Ct. App. 2005), trans. denied. As the basis for the breach of the contract was an unwarranted demand for a higher price, the inflated price cannot support the claim of fraud. However, the record is replete with other instances when Magill made material misrepresentations to the Lutzes.

First, Magill specifically made a request for a draw from the Lutzes to purchase lumber for the home. Magill ordered the lumber but failed to use the money from the draw to pay for it. The Lutzes relied on Magill's representation that it paid the supplier for the lumber. After testifying that he did not use at least $14,000 of the draw money to pay outstanding subcontractor invoices because "it wasn't my debt to pay," Brian admitted that it is a general contractor's responsibility to ensure that the subcontractors are paid. Tr. at 367 and 401. Based on Magill's misrepresentation and the Lutzes's reliance thereon, the lumber supplier filed a lien for $14,000 on the home. Because this lien was placed on the home and remained for more than fifteen days in violation of the construction loan, the Lutzes had defaulted on their mortgage, resulting in the foreclosure on their home and the payment of $10,500 in attorney fees to FHB. This evidence supports a separate claim of fraud resulting

in an injury distinct from that of the breach of contract.

In the pursuit of profit, Brian did not stop there. He admittedly filed an inflated mechanic's lien against the property. Brian blamed this on lack of advice from his attorney in that his counsel "never said you can't collect on money that you haven't done work for or money that isn't out there." Tr. at 114. As did the trial court, we find this explanation unavailing. Even when Brian had the opportunity to prove his expenses on the incomplete project, he chose to alter one of the invoices and requested the relevant subcontractor to lie about the original amount, if questioned. The subcontractor refused to follow Brian's lead and informed the trial court of Magill's dishonesty. In light of this overwhelming evidence of Magill's numerous misrepresentations, we conclude that the trial court did not err in determining that Brian and the LLC committed fraud against the Lutzes.

Conclusion

In sum, the trial court erred in requiring a written work order to modify the contract. In contrast to the trial court's conclusion, the parties modified the contract to include a larger laundry room for fifteen hundred dollars. On remand, we direct the trial court to enter the appropriate finding and recalculate the breach of contract damages accordingly. Despite this modification, the evidence supports the conclusion that Magill's actions constituted an anticipatory breach of the contract. Furthermore, the trial court was correct in refusing to award damages to Magill and determining that Brian and the LLC committed fraud.

Affirmed in part, reversed in part and remanded.

MATHIAS, J., and BARNES, J., concur.